Petition

81-1178

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN ANTHONY YUNKER - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not in this misdemeanor-recidivist prosecution where "loss of liberty" is involved certain constitutional safeguards contained in the Sixth Amendment and the Fourteenth Amendment to the United States Constitution entitled the petitioner to a bifurcated jury trial especially when Kentucky law now compels bifurcated jury trials in other prosecutions?

II. Whether or not *Spencer* v. *State of Texas,* 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) should be re-evaluated in light of certain subsequent modern penal code procedural developments that now favor bifurcated-two-stage jury trials in recidivist prosecutions?

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v.

COMMONWEALTH OF KENTUCKY - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, John Anthony Yunker, respectfully prays that a Writ of Certiorari issue to review the proceedings in this case including the refusal of the Supreme Court of Kentucky to grant discretionary review of the Petitioner's case.

OPINIONS BELOW

The opinions issued in this case by various Kentucky Courts include:

The Trial Orders and Judgment of the Daviess District Court, Division III, the Honorable George V. Triplett, presiding, dated and entered on November 25, 1980;

An Opinion and Order Affirming of the Daviess Circuit Court, Division II, the Honorable Robert M. Short, presiding, dated and entered on May 19, 1981;

An Order Denying Discretionary Review of the Kentucky Court of Appeals, Judges Hogge, Howerton

and Lester, presiding, dated and entered on July 23, 1981;

And an Order Denying Motion for Discretionary Review of the Supreme Court of Kentucky, Honorable Chief Justice John S. Palmore, presiding, dated and entered October 27, 1981.

JURISDICTION

There are no appellate opinions below involving this case. This case originated in the Daviess District Court, Division III, Owensboro, Kentucky. A trial order was entered on November 25, 1980. From there the case was timely appealed to the Daviess Circuit Court, Division II, and on May 19, 1981 this Circuit Court affirmed the rulings of the trial court. From there a timely Motion for Discretionary Review was filed and denied by the Kentucky Court of Appeals on July 23, 1981. From there a timely Motion for Discretionary Review was filed and denied by the Supreme Court of Kentucky on October 27, 1981.

There has been no order entered respecting a rehearing and there has been no order entered granting an extension of time within which to petition for Certiorari.

There has been no cross-petition for Writ of Certiorari filed to the knowledge of this Petitioner.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review this case by a Petition for a Writ of Certiorari is 28 U.S.C. § 1257(3).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States — Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Constitution of the United States — Amendment XIV, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statute 189.520(2):

"No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability."

Kentucky Revised Statute 189.990(9)(a):

"Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than $100 nor more than $500; for the second offense, a fine of not less than $100 nor more than $500 and imprisoned for not less than three (3) days nor more than six (6) months; for each subsequent offense he shall be fined not less than $100 nor more than $500 and imprisoned for not less than thirty (30) days nor more than twelve (12) months."

Kentucky Revised Statute 532.080(1):

"When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose."

Kentucky Revised Statute 431.190:[1]

"Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state."

Kentucky Revised Statute 242.230(1):

"No person in dry territory shall sell, barter, loan, give, procure for or furnish another, or keep or transport for sale, barter or loan, directly or indirectly, any alcoholic beverages."

Kentucky Revised Statute 242.990(1):

"Any person who violates any of the provisions of this chapter, for which no other penalty is herein provided, shall, for the first offense, be fined not less than twenty (20) nor more than one hundred dollars ($100) and, if a natural person, imprisoned in the county jail for not less than thirty (30) nor more than sixty (60) days; for the second offense he shall be fined not less than forty (40) nor more than two hundred dollars ($200) and, if a natural person, imprisoned in the

[1]This statute was Kentucky's Habitual Criminal Statute and repealed, effective January 1, 1975, in favor of Kentucky's [illegible]tent Felony Offender Statute, KRS 532.080.

county jail for not less than sixty (60) nor more than one hundred and twenty (120) days; for the third and each subsequent offense he shall, if a natural person, be confined in the penitentiary for not less than one (1) nor more than two (2) years, and if a corporation, be fined not less than one thousand ($1,000) nor more than two thousand dollars ($2,000)."

CONCISE STATEMENT OF THE CASE

This is a criminal-traffic-misdemeanor case wherein the Petitioner received a jail sentence after being prosecuted as a recidivist-offender of Kentucky's "drunk driving" statute—Kentucky Revised Statute 189.520 (2), *supra,* (hereinafter referred to as KRS).

A concise statement of the case containing the facts material to the consideration of the questions presented is as follows.

On July 23, 1980, the Petitioner, John Anthony Yunker, was charged by Kentucky State Trooper, David Osborne, with speeding (67 mph in a 55 mph zone) and also with driving under the influence of intoxicating beverages, (hereinafter referred to as "DUI"), in Daviess County, Kentucky. The case was ultimately assigned to a jury trial in the Daviess District Court, Division III, the Honorable George V. Triplett, presiding.

On November 14, 1980, the case was tried before a six-person jury with the Petitioner being represented by Daniel M. Burlew, II, and the Commonwealth of Kentucky being represented by the Honorable Robert M. Kirtley, Daviess County Attorney.

At the commencement of the jury trial, the Respondent notified the Petitioner of its intention to prosecute him as a recidivist-second offender authorized under KRS 189.990(9)(a), *supra,* thus placing the Petitioner, if convicted, in jeopardy of losing his liberty to the Daviess County Jail for a mandatory minimum period of three (3) days to a maximum period of six (6) months.

In so prosecuting the Petitioner as a "DUI"-second offender, the Respondent introduced into evidence during the "trial-in-chief" the Petitioner's four-and-a-half (4½) year old "DUI" conviction wherein he had also been represented by counsel. The only other evidence presented before the jury was the testimony of the State Trooper and the Petitioner.

In all candor, the factual situation surrounding the Petitioner's driving ability was by no stretch of the imagination aggravated. The State Trooper even verified he wouldn't have paid any attention to the Petitioner's automobile if he hadn't had his "oncoming radar" device activated.

This fact was only mentioned to illustrate that the evidence against the Petitioner, who admitted he had been drinking, was not as strong as exists in most "DUI" cases.

At the conclusion of the trial, the Petitioner was found guilty with his punishment fixed by the jury at a fine of Twenty Six Dollars ($26.00) and costs on the speeding charge, and One Hundred Dollars ($100.00) and costs and three (3) days in the County Jail on the "DUI" charge.

During the trial and afterwards in a motion for a new trial, the Petitioner unsuccessfully argued to Judge Triplett that the introduction into the "trial-in-chief" of the evidence about the Petitioner's prior "DUI" record was highly prejudicial and completely irrelevant to the new charge of "DUI" and that the jury should not have been allowed to hear this evidence until they *had first* found the Petitioner guilty on the current charge he was accused of committing.

In all fairness it should be additionally pointed out that even though the Petitioner's arguments were overruled during and following the trial, Judge Triplett, pursuant to the Petitioner's objection and motion, did orally admonish the juriors during the trial that the Petitioner's prior conviction was only to be considered by them in relation to the punishment aspects of this case; however, it must also be noted that no limiting-written instructions regarding this admonishment were submitted to the jury.

Following the Petitioner's conviction, the Petitioner filed a motion for new trial, and on Friday, November 21, 1980, the Petitioner advanced the arguments among which surrounded his right to a bifurcated proceeding. This motion was overruled in an Order entered therein on November 25, 1980. (See Appendix A & B for copies of these orders.)

Subsequently, the Petitioner timely filed a notice of appeal with the Daviess Circuit Court, Div. II, and this appeal was perfected pursuant to the Kentucky Rules of Civil Procedure. The issues contained herein were advanced in this appeal, but on May 19, 1981, an opin-

ion and order was enterd by the Honorable Robert M. Short affirming the judgment of the Daviess District Court in all respects and dismissing the appeal. (See Appendix C for copy of this Order.)

Subsequently, the Petitioner timely moved the Kentucky Court of Appeals, pursuant to the Kentucky Rules of Civil Procedure, for discretionary review of the issues presented in this Petition, and on July 23, 1981, the Kentucky Court of Appeals entered an Order denying his Motion for Discretionary Review. (See Appendix D for copy of this Order).

Subsequently, the Petitioner timely moved the Supreme Court of Kentucky, pursuant to the Kentucky Rules of Civil Procedure, for discretionary review of the issues presented in this petition, and on October 27, 1981, an Order was entered by the Supreme Court of Kentucky denying his Motion for Discretionary Review. (See Appendix E for copy of this Order.)

DIRECT AND CONCISE ARGUMENT

I. Whether or Not in This Misdemeanor-Recidivist Prosecution Where "Loss of Liberty" is Involved Certain Constitutional Safeguards Contained in the Sixth Amendment and the Fourteenth Amendment to the United States Constitution Entitled the Petitioner to a Bifurcated Jury Trial Especially When Kentucky Law Now Compels Bifurcated Jury Trials in Other Prosecutions?

The Petitioner, John Anthony Yunker, is challenging the legal effect of Kentucky's recidivist-drunk

driving statutes insofar as they apply to the criminal procedure utilized during the trial of the accused-Petitioner charged with violating said statute.

The Petitioner concedes that the statutes in question KRS 189.520(2), *supra,* and its recidivist counterpart, KRS 189.990(9)(a), *supra,* are constitutionally permissible, and that the Petitioner's prior conviction was not constitutionally infirm so as to render it inadmissible on its face.

However, the Petitioner does insist that the criminal procedure followed in the application of these statutes in the Daviess District Court's jury trial as to the sequence of evidence about his prior conviction was clearly repugnant to certain safeguards afforded him under the Sixth and Fourteenth Amendments to the United States Constitution and this Court's interpreting decisions. The reasons for this concern themselves basically with "fundamental fairness" and equal treatment, and they are several-fold.

First, this Court's landmark decision of *Spencer* v. *State of Texas,* 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967), dealt squarely with the constitutional rights to a bifurcated or "two-stage" jury trial in a Texas recidivist-felony prosecution. In a five-four decision, the Texas procedure was upheld as being economically correct especially if the trial judge provided the jury with limited instructions as to the weight to be attached to any prior convictions they may have heard testimony about.

On the other hand, it is extremely critical to point out that various procedural developments have since

occurred in certain modern criminal codes that now compel bifurcated proceedings when prosecuting recidivists.

At the time the Petitioner was arrested and charged with "DUI", such a procedural change had already occurred in Kentucky under KRS 532.080, and apparently so in other jurisdictions.[2]

With this being the situation, it is obviously clear that, at least in Kentucky, the minority and dissenting position of *Spencer* v. *State of Texas, supra,* has now been codified by statute as being the "fairest" way to prosecute a repeat felony offender.

As can be readily seen, KRS 189.990(9)(a), *supra,* is statutorily silent as to the procedure to follow concerning the introduction into evidence of prior convictions, and the Petitioner is unaware of any Federal or Kentucky appellate decisions that shed any light on the procedure used in this particular type of recidivist-misdemeanor case. Traditionally, in this type of "DUI"-recidivist case, the procedure that was followed concerning the sequence of prior conviction evi-

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[2]The 1974 commentary to KRS 532.080 states: "This section provides special authorization for the disposition of offenders who have committed several serious offenses and who have been subjected to repeated terms of incarceration. This type of provision, familiar to pre-existing Kentucky law as well as to most states, is contained *in almost all of the modern criminal codes.* While all of the codes are similar in their treatment of the persistent offender, they differ substantially with respect to the following two questions: (i) What should be the duration of an extended term of imprisonment imposed upon an habitual offender; and (ii) Upon what type of individual should the extended term be imposed". (Emphasis ours)

dence paralleled the procedure that was followed in the trials of local "bootleggers" and in the trial of recidivist felons being prosecuted under Kentucky's since-repealed Habitual Criminal Statute, KRS 431.190, *supra.*

This statute, (KRS 431.190), *supra,* was also statutorily silent surrounding the sequence of evidence about former convictions, but the Kentucky Court of Appeals (now the Supreme Court of Kentucky) adopted a procedural policy settled by the majority opinion in *Spencer* v. *State of Texas, supra.* This was confirmed in *Thomas* v. *Commonwealth,* Ky., 412 S. W. 2d 578 (1967), and in many other subsequent cases including *Hardin* v. *Commonwealth,* Ky., 428 S. W. 2d 224 (1968); *Johnson* v. *Commonwealth,* Ky., 445 S. W. 2d 704 (1969); *Shull* v. *Commonwealth,* Ky., 475 S. W. 2d 469 (1971); *Murray* v. *Commonwealth,* Ky., 474 S. W. 2d 359 (1971); *Stewart* v. *Commonwealth,* Ky., 479 S. W. 2d 23 (1972); and *Dawson* v. *Commonwealth,* Ky., 498 S. W. 2d 128 (1973).

Moreover, this procedure adopted for use under KRS 431.190 was also approved by Kentucky's highest Court as the appropriate method in prosecuting recidivist "bootleggers" pursuant to Kentucky's local option laws.

KRS 242.230(1), *supra,* and its recidivist counterpart, KRS 242.990(1), *supra,* which makes the third "bootlegging" conviction a felony, are still viable and *once again silent* as to the procedural sequence to follow when introducing prior convictions, but in *Rodgers* v.

Commonwealth, Ky., 399 S. W. 2d 299 (1966), Kentucky's highest appellate Court stated:

> "This Court decided that instructions on the local option laws (KRS 242.990) must also comply substantially with instructions under the Habitual Criminal Statute.

KRS 431.190, *supra,* was effectively repealed on January 1, 1975, in favor of KRS 532.080, *supra,* which is Kentucky's Persistent Felony Offender Statute and *which does* outline the procedure to follow concerning the sequence of evidence about former convictions. On its face, it clearly overrules the procedure applauded by everyone of the above Kentucky cases that interpreted its legislative predecessor.

KRS 532.080, *supra,* and its procedures[3] were subsequently interpreted in *Brown* v. *Commonwealth,* Ky., 551 S. W. 2d 557, (1977), a felony-armed robbery case decided prior to the Petitioner being arrested and

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[3]The 1974 commentary to KRS 532.080 further states: "Finally, it should be noticed this section requires that the determination of whether or not an offender is a persistent felony offender be made in a separate proceeding. This is an essential part of the provision if unfair influence upon the question of guilt or innocence in the most recent offense is to be avoided. It is anticipated that the procedure under this section would be as follows: The defendant would be tried for his present offense and if convicted would be sentenced by the jury in accordance with the provisions of KRS 532.060. Immediately thereafter, a special proceeding would be commenced before that same jury for the purpose of determining whether he should be designated as a persistent

(Footnote continued on following page)

prosecuted for "DUI". Therein, Kentucky's highest Court, through Chief Justice John Palmore, stated:

> "The obvious purpose of the bifurcated trial in a recidivist prosecution is to shield the defendant from the unfair influence his previous convictions are bound to have on the jury in determining his guilt or innocence of the crime for which he is presently being tried. It is at this first stage that the evil existed, and that is the only evil the statute was designed to eliminate. It was not intended to give him a bonus at the other end. The Hobson's choice of electing to remain silent or subjecting himself to impeachment remains unchanged. If he elects to testify, what he says can be used against him in the second stage of the trial to the same extent that it can be used against him as an admission in a wholly separate trial for a different offense."

Recently, Kentucky's intermediate appellate Court, the Kentucky Court of Appeals, decided similarly in *White* v. *Commonwealth,* Ky., App., 611 S. W. 2d 529 (1980), which was a felony-drug case. Therein the Court stated:

(Footnote continued from preceding page)

felony offender and sentenced under KRS 532.080. If the prosecution proves that he is a persistent felon, as that label is defined in this section, and the jury so finds, then the defendant is to be resentenced by the jury in accordance with the limitations established by subsection (4). If the jury is unable to agree unanimously that the defendant is a persistent felony offender or as to the sanction to be imposed upon him the sentence fixed by the jury under KRS 532.606 shall stand."

> "The purpose of bifurcating the persistent felony offender stage of a trial is to avoid creating an unfair influence upon the question of the guilt or innocence of the defendant with the respect to the current charge."

The Petitioner contends that to deny him the access and opportunity to the same criminal procedure now followed under the above statute (KRS 532.080) and now being interpreted by Judge Palmore as an "evil eliminator" denies him, among other rights, equal protection of the law especially where he faces mandatory loss of liberty if convicted under KRS 189.990(9)(a), *supra.*

The reasons for enacting the above statute in the first instance should have as much concern and application for an accused-misdemeanant facing mandatory incarceration as well as an accused-felon facing likewise mandatory incarceration. Both situations involve "deprivation of liberty" and to allow certain defendants in certain prosecutions to benefit from the luxury of a bifurcated proceeding and to deny the same benefits to other defendants within the same jurisdiction who likewise face loss of liberty must, in fact, violate equal protection of the law and fundamental fairness. This would seem to be especially so where the particular recidivist statute in question is silent on the subject!

The dilemma that now surfaces is which policy should a Kentucky trial court in a "DUI" recidivist prosecution adopt especially since the subject "DUI" statute is silent in this regard?

The Petitioner takes the position that KRS 532.080, *supra,* was enacted by the Kentucky legislature and interpreted by the Supreme Court of Kentucky in *Brown* v. *Commonwealth, supra,* to provide an accused with, among other things, a fair trial by an impartial jury as guaranteed under the Sixth Amendment to the United States Constitution. This position is undoubtedly consistent with the dissenting opinions of *Spencer* v. *State of Texas, supra.* If the Petitioner is correct in this regard, then obviously, that same constitutional guarantee should apply to him even though he was only charged as a recidivist-misdemeanant.

The Petitioner faced mandatory loss of liberty if convicted and the decision of *Argersinger* v. *Hamlin,* 407 U. S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), that extended the Sixth Amendment right to counsel previously afforded accused-felons to accused-misdemeanants, who also faced loss of liberty, would seem to no doubt apply here.

No rational basis for the different treatment of the above accused recidivists (felons or misdemeanants) and evidentiary procedures used in their prosecution can be even imagined by the Petitioner. As a matter of equal protection of the law, the Petitioner was "short-changed" to say the least. This logic is even bolstered by the prior Kentucky "bootlegging" decisions that followed the procedure mandated in the old "Habitual Criminal" cases.

Secondly, the Petitioner does not, by any means, agree that Judge Triplett's oral admonition to the jury during the "DUI" trial-in-chief cured or rendered

harmless any constitutional deficiency that may have existed at the time. This needs to be briefly touched upon so that this Court does not misunderstand the situation.

Yes, Judge Triplett pursuant to Petitioner's request did orally admonish the jury as to the weight to be given about the Petitioner's prior conviction, but, no, Judge Triplett disagreed with the Petitioner's position regarding a two-stage jury trial. To say that the Petitioner received a fair trial in Kentucky under existing law because of this oral admonition would be placing no emphasis whatsoever on the Petitioner's right to equal treatment. The jury had already been exposed to the damaging evidence, and the Court's oral admonition did not "unring the bell" so to speak.

Furthermore, it must be pointed out that Judge Triplett did not provide the jury with any written limited instructions about the procedure used. Admittedly, the Petitioner did not request a written limited instruction, but in the cases of *Evans* v. *Cowan,* 6th Cir., 506 F. 2d 1248 (1974) and *Davis* v. *Cowan,* 6th Cir., 531 F. 2d 1374 (1976), the Sixth Circuit United States Court of Appeals, in both instances, reversed two Kentucky felony convictions for the failure of the trial court to provide a limited instruction *even though the defendant had not requested one.* (Emphasis ours)

Limited instructions have been viewed with extreme caution before this Court and more particularly in *Bruton* v. *United States,* 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), where this Court decided that

the use of a co-defendant's confession incriminating his partner was prejudicial error even in spite of limiting instructions. Therein, this Court concluded that *Delli Paoli* v. *United States,* 352 U. S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278 (1957), should be overruled.

Again in *Burgett* v. *State of Texas,* 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), this Court prohibited the use of uncounseled prior convictions in a recidivist prosecution even though limited instructions were given. Therein this Court stated:

> "The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it make the constitutional error harmless beyond a reasonable doubt within meaning of *Chapman* v. *State of California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705."

II. Whether or Not *Spencer* v. *State of Texas,* 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) Should Be Re-Evaluated in Light of Certain Subsequent Modern Penal Code Procedural Developments That Now Favor Bifurcated-Two-Stage Jury Trials in Recidivist Prosecutions?

Thirdly, and most importantly, the Petitioner urges that under today's procedural atmosphere regarding bifurcated two-stage jury trials, this Court should cautiously consider revisiting, reanalyzing and reconsidering its split decision of *Spencer* v. *State of Texas, supra.*

Apparently, modern penal codes throughout this country have now enacted recidivist statutes which compel bifurcated two-stage jury trials. (See footnote 2)

Additionally, *Delli Paoli* v. *United States, supra,* which was relied on by the majority in *Spencer* v. *State of Texas, supra,* has since been overruled, and coupled with this Court's decisions of *Burgett* v. *State of Texas, supra,* and *Bruton* v. *United States, supra,* it certainly appears that the dissenting and minority viewpoint contained in *Spencer* v. *State of Texas, supra,* is now favored.

The Petitioner, throughout the arguments he advanced during the various trial and appeal stages in Kentucky, adopted the position of the dissenting opinions in *Spencer* v. *State of Texas, supra,* and the Petitioner once again adopts these dissenting opinions in their entirety, including their footnotes, for the purposes of this petition.

Lastly, this Court now has the opportunity to consider whether or not its decision in *Spencer* v. *State of Texas, supra,* is creating a procedural question-mark for trial judges in Kentucky, and perhaps in other jurisdictions, that concern recidivist prosecutions under statutes that are silent as to the procedural sequence pertaining to prior convictions and their introduction into evidence.

Kentucky has several recidivist statutes that are silent in this regard and they not only involve drunk driving and bootlegging violations but also controlled

substance violations.[4] Convictions under these statutes can result in automatic deprivation of liberty, and in some instances, a felony record. This matter needs to be settled once and for all especially since certain legislative bodies apparently, including the State of Texas,[5] have taken a position directly opposite to that advanced by the majority in *Spencer* v. *State of Texas, supra.*

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[4]See KRS Chapter 218A and KRS 218A.990 *et seq.* for penalties therein.

[5]See *Tinney* v. *State*, Tex. Cr. App., 578 S. W. 2d 137 (1979).

CONCLUSION

Kentucky courts refused to render a legal opinion concerning the legal arguments contained in this appeal.

The Petitioner's substantive rights to trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution *plus* his substantive rights to "fundamental fairness" and equal protection of Kentucky law when his liberty is jeopardized were disregarded herein.

This Court should grant certiorari to hear this case and to see whether or not the Petitioner, under Kentucky and Federal law, should have been afforded a bifurcated jury trial and to additionally re-evaluate *Spencer* v. *State of Texas, supra,* as to any trial procedural inconsistencies that must now exist in regard to modern Penal Codes and to various other recidivist statutes in Kentucky and throughout the country that are silent as to the procedural sequence to be utilized when introducing into evidence the prior convictions of an accused facing enhanced punishment and incarceration.

Respectfully submitted,

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APPENDIX

APPENDIX A

DAVIESS DISTRICT COURT

DIVISION III

No. 80-T-2294

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOHN ANTHONY YUNKER - - - - *Defendant*

TRIAL ORDER AND JUDGMENT

On the 14th day of November, 1980, this matter being set for a Jury Trial, came the Defendant, John Anthony Yunker, and his attorney, Daniel M. Burlew, II, and the Daviess County Attorney, Robert M. Kirtley, and the following Jury was accepted by both sides and duly sworn to try this case:

Joseph Cecil
James Coomes
Toni Bickett
William VonLehman
Margaret Pickrell
Darrell Chambers

This case was reported with the Commonwealth making its opening statement and presenting evidence on its behalf, and the Defendant thereupon making an opening statement and presenting evidence in behalf of his defense with Motions and Objections being ruled upon throughout; and after both sides announced through, the Jury was instructed by this Court and the case was finally argued by the attorneys. The Jury thereupon retired to the Jury

Room, and after deliberating, returned into open Court with the following verdict:

> We, the Jury, find the Defendant guilty as charged and fix his punishment at a fine of $26.00 and costs on the speeding charge, and $100.00 and costs and three days in the County Jail on the DUI charge.
>
> /s/ Joseph Cecil
> Foreman

WHEREUPON, the Court asked the Defendant and the Commonwealth if they wished to poll the Jury. Neither the Defendant nor the Commonwealth requested that the Jury be polled. Thereupon, the Jury was excused.

WHEREFORE, it is the Judgment of this Court that the Defendant is guilty as charged and his punishment is fixed at a fine of TWENTY-SIX DOLLARS ($26.00) and costs on the speeding charge and ONE HUNDRED DOLLARS ($100.00) and costs and three (3) days in the County Jail on the DUI charge.

ENTERED this the 25th day of November, 1980.

/s/ Hon. George V. Triplett, Judge
Daviess District Court, Division III

Prepared By:

/s/ Daniel M. Burlew, II
Attorney for Defendant

Have Seen:

/s/ Robert M. Kirtley
Daviess County Attorney

I certify that the foregoing is a full and correct copy as appears in my office. This 25th day of November, 1980.

Daviess Circuit Court
By: /s/ Connie Rouse, D.C.

APPENDIX B

DAVIESS DISTRICT COURT

DIVISION III

No. 80-T-2294

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff*

v.

JOHN ANTHONY YUNKER - - - - *Defendant*

ORDER

On Motion of the Defendant for a new trial or to set aside the conviction, by and through counsel, and after hearing argument of counsel at a hearing on Friday, November 21, 1980, and the Court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that said Motion be, and it is, hereby overruled.

This the 25th day of November, 1980.

/s/ Hon. George V. Triplett, Judge
Daviess District Court, Division III

Prepared By:

/s/ Daniel M. Burlew, II
Attorney for Defendant

Have Seen:

/s/ Robert M. Kirtley
Daviess County Attorney

I certify that the foregoing is a full and correct copy as appears in my office. This 25th day of November, 1980.

Daviess Circuit Court
By: /s/ Connie Rouse, D.C.

APPENDIX C

DAVIESS CIRCUIT COURT

DIVISION No. II

No. 80-X-026

JOHN ANTHONY YUNKER - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

OPINION AND ORDER AFFIRMING

This matter is on appeal from the District Court, Defendant's principle complaint being that he was denied a continuance and that his attorney was rushed into a too speedy trial. Although counsel might reasonably feel that the District Judge should have granted him a continuance, this Court cannot conclude that the action of the District Court was in excess of its authority or in anyway an abuse of discretion. The Court has also examined the other alleged errors complained of, and is of the opinion that they are either without merit or were not properly preserved at the trial level.

ORDER AFFIRMING

The Judgment of the District Court is affirmed in all respects, and this appeal is dismissed.

This the 19th day of May, 1981.

/s/ Robert M. Short

Copies Mailed to:

Hon. Robert M. Kirtley
Attorney for Appellee

Hon. Daniel M. Burlew, II
Attorney for Appellant

Judge George V. Triplett,
Daviess District Court, Division III

APPENDIX D

COURT OF APPEALS OF KENTUCKY

No. 81-CA-1134-D

JOHN ANTHONY YUNKER - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: HOGGE, HOWERTON and LESTER, JUDGES.

The Court, having considered the motion for discretionary review and being otherwise sufficiently advised, ORDERS that it be, and is hereby, DENIED.

ENTERED: July 23, 1981

/s/ E. M. Hogge
Judge, Court of Appeals

APPENDIX E

SUPREME COURT OF KENTUCKY

81-SC-573-D
(81-CA-1134-D)

JOHN ANTHONY YUNKER - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Daviess Circuit Court
#80-X-026

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of John Anthony Yunker for a review of the decision of the Court of Appeals is denied.

ENTERED October 27, 1981.

/s/ James S. Palmore
Chief Justice

Opposition

Office - Supreme Court, U.S.
FILED
JAN 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1178

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN ANTHONY YUNKER - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DAVIESS CIRCUIT COURT OF KENTUCKY

STEVEN L. BESHEAR
Attorney General

CARL T. MILLER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: 564-4023
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Whether in a misdemeanor trial for the second offense of driving while intoxicated where the mandatory penalty includes a fine and from three days to six months in jail the defendant has a right under the United States Constitution to a bifurcated jury trial?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1178

JOHN ANTHONY YUNKER - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DAVIESS CIRCUIT COURT OF KENTUCKY

May it please the Court:

The Respondent accepts the Petitioner's statement of the (1) Opinion Below and (2) Jurisdiction. The Respondent takes exception to the Petitioner's statement of (1) Questions Presented, (2) Constitutional Provisions and Statutes involved and (3) Statement of the Case.

COUNTERSTATEMENT OF THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that the question involved in the Petition includes the Constitution of the United States—Amendment VI and Amendment XIV, §1.

The Respondent also agrees that the question involves Kentucky Revised Statutes 189.520(2) and 189.990(9)(a).

The Respondent adds as statutory provisions involved Kentucky Revised Statute 189.520(4):

> "In any criminal prosecution for a violation of subsections (1) and (2) of this section, wherein the defendant is charged with having operated a vehicle while under the influence of intoxicating beverages, the amount of alcohol in the defendant's blood as determined at the time of making a chemical analysis of his blood, urine, breath or other bodily substance, shall give rise to the following presumptions:
>
> "(a) If there was 0.05 percent (5/100 percent) or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages:
>
> (b) If there was more than 0.05 percent (5/100 percent), but less than 0.10 (1/10 percent) by weight of alcohol in such blood, such fact shall not constitute a presumption that the defendant either was or was not under the influence of intoxicating beverages, but such fact may be considered, together with other competent evidence, in determining the guilt or innocence of the defendant;
>
> (c) If there was 0.10 percent (1/10 percent) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages."

The Respondent states that the following statutes included in the Petitioner's statement of the constitutional and statutory provisions involved are not per-

tinent to the question presented. KRS 532.080(1), KRS 431.190 (repealed), KRS 242.230(1) and KRS 242.990(1).

COUNTERSTATEMENT OF THE CASE

The Petitioner's Statement of the Case is substantially correct except that it seeks to imply that the Petitioner was not sufficiently intoxicated to have been convicted of driving while intoxicated in violation of KRS 189.520.

In Petitioner's briefs filed on appeal in the Daviess Circuit Court of Kentucky and the Kentucky Court of Appeals it is stated that a breathalizer test performed on the Petitioner resulted in a finding of alcoholic content in the blood of 0.17 percent. A person is conclusively presumed to be intoxicated in Kentucky if such a test results in a finding of alcoholic content in the blood of 0.10 percent or more. KRS 189.520(4)(c).

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present an Important Federal Question.

The Petitioner claims that his right to an impartial jury, guaranteed by the Sixth Amendment, was violated by his one-part trial on a charge of second offense driving while intoxicated. He also claims that a one-part trial violated "fundamental fairness" and deprived him of due process of law under the Fourteenth Amendment, §I.

The Petitioner's claims of constitutional deprivation are based entirely on a lack of a proper sense of proportion. To bolster his case the Petitioner repeatedly uses the word "recidivist." "Recidivist" is defined by *Black's Law Dictionary, Revised Fourth Edition,* as follows:

> "Recidivist. A habitual criminal. An incorrigible criminal. One who makes a trade of crime. McDonald, Criminology, Chapter VIII; *People* v. *Rave,* 364 Ill. 72, 3 N. E. 2d 972, 976."

Under proper legal terminology, recidivism has nothing at all to do with this case. The Petitioner's reliance upon statutes and case law having to do with habitual criminals and persistent felony offenders misses the point on the question presented in this case.

Under KRS 189.990(9)(a), the usual penalty for driving while intoxicated includes a jail term of at least three days except for the first offense, where only a fine is imposed. This statute reflects *legislative lenity* as compared to the persistent felony offender statute, KRS 532.080, which reflects *legislative severity.* In other words, there is really no comparison between the two statutes which would mandate that the procedure used under one statute would have to be used under the other to comport with due process of law.

The use of the recidivist argument by the Petitioner is [redacted] pettifoggery equal to referring to a manicure as an amputation.

All that the Petitioner is attacking is what he conceives to be a constitutional omission in the procedural

rules of a state court which do not require a bifurcated trial on the second offense misdemeanor of driving while intoxicated. This Court has declined to make procedural rules for the state courts even for serious felony cases involving life imprisonment or the death penalty. As the Petitioner well knows, this Court declined to make a constitutional censure in the case of *Spencer* v. *Texas,* 385 U. S. 554, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967) even though the life sentence was involved. And yet, the Petitioner raises what he says is the same issue, a one-part trial, involving a misdemeanor where the maximum possible penalty is six months in jail. The Respondent says that the issue is not the same since the habitual criminal statutes obtaining in *Spencer* v. *Texas, supra,* where the basis for a prosecution fixing a status enhancing the penalty. But even if the issue is the same, the reasoning of the Court in *Spencer* is still sound where it said:

> "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint trials, whether of several co-defendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. (Citations omitted.) This type of prejudicial effect is acknowledged to

> inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest." 385 U. S. 562.

Again in the Spencer opinion, this Court referred to *Michelson* v. *United States,* 335 U. S. 469, 93 L. Ed. 168, 69 S. Ct. 213, where it held

> ". . . that this court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the longstanding practice at issue. *A fortiori,* this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this court over proceedings in the lower federal courts . . . but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts. It is noteworthy that nowhere in *Michelson* did the Court or dissenting opinions approach the issue in constitutional terms." 385 U. S. 563.

The Petitioner's complaint does not rise to constitutional proportions. Moreover, he has not shown that various courts, state or federal, have arrived at different conclusions on the constitutionality of a one-part second offense misdemeanor trial. He has not shown that there is a compelling necessity for this court to rule on the question presented.

II. A Bifurcated Trial Would Not Have Been More Fair to the Petitioner.

Appellant's due process complaint is a lack of fundamental fairness in his trial. A bifurcated trial would not have been more fair to the Petitioner than the one-part trial, as can be clearly seen by imagining the scenario which would have resulted if the Petitioner had had his way. The jury would have heard evidence from the State Trooper who arrested the Petitioner for driving while intoxicated, including the evidence of 0.17 percent alcoholic content in the Petitioner's blood. No mention would have been made of his previous conviction for driving while intoxicated. If the jury found the Petitioner guilty as though for the first offense, it would have set the penalty of not less than a $100 nor more than a $500 fine. Then the Court would have told the jury that it would have to hear more evidence on the second phase of the case to determine if the Petitioner was a second offender. Documentary evidence would have been presented by the Commonwealth and would have been unrefuted by the Petitioner. A conscientious jury could not have done otherwise than convict the Petitioner as a second offender and impose the minimum of a $100 fine and 3 days in jail. This is the exact penalty which the jury imposed in the one-part trial.

In the one-part trial which the Petitioner actually received, the jury heard evidence in the Commonwealth's case in chief that the Petitioner had a previous conviction for driving while intoxicated and the

jury was instructed by the Court that if they found the Petitioner guilty of the present charge, the minimum penalty would have to be a $100 fine and 3 days in jail. In that type of trial an honorable jury could have considered whether the Petitioner's present offense was serious enough to deprive the Petitioner of at least three day's liberty and could have, honorably, found the Petitioner not guilty. In the one-part trial which the Petitioner actually received, he had the advantage. In a bifurcated trial, if the jury found him guilty of the present offense, it could not do otherwise honorably than to convict him for the second offense. But the jury would not have known in advance what the final consequences of its conviction of the first offense would be.

The one-part trial procedure in the Appellant's case was more than fundamentally fair. It was in fact advantageous to the Petitioner. He was not deprived of due process of law

III. The One-Part Trial Did Not Deprive the Petitioner of an Impartial Jury.

The impartiality of the jury must be viewed as to the state of mind of the jury at the beginning of the trial. It is to be presumed that the jury will follow the instructions and heed the admonitions of the court, consider the evidence as presented, and disregard the evidentiary matter which the court admonishes must be disregarded. *Spencer* v. *Texas, supra.* It is significant in this case that the jury gave the minimum penalty provided by law. The Petitioner has not

shown, either by presumption or by actual fact, that he was deprived of an impartial jury because of the one-part trial of his case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

By: CARL T. MILLER, JR.
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(Tel. (502) 564-4023)
Counsel for Respondent

PROOF OF SERVICE

I hereby certify that three copies of the foregoing *Response to Petition for Writ of Certiorari* have been mailed, postage prepaid, to John D. Miller and Daniel M. Burlew, II, Miller, Taylor, Burlew & Meyer, Attorneys for Petitioner, 218 Masonic Building, 227 St. Ann Street, Owensboro, Kentucky 42301, this ____ day of January, 1982.

CARL T. MILLER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601